Supreme Court, U.S.
FILED
MAR 3 - 2005
OFFICE OF THE CLERK

No. 04-1056

IN THE

Supreme Court of the United States

EMC MORTGAGE CORPORATION,

Petitioner,

v.

STANLEY WILLIAM STARK and PATRICIA GARNET STARK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

The Starks more accurately state the questions presented:

1. **Intracircuit conflict.** The circuit courts resolve intracircuit conflicts by sitting *en banc*. The Eighth Circuit found no conflict between this case and *Gannon v. Circuit City Stores, Inc.*, an arbitrability case. It voted not to rehear this case *en banc*.

   Should the Court resolve EMC's supposed intracircuit conflict?

2. **Expanded judicial review.** The Constitution applies only to state action. EMC and the Starks signed a private arbitration contract.

   Should the Court expand the Constitution to cover private contracts, so lower courts must review arbitration awards under the Due Process Clause?

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STATEMENT OF THE CASE

Judge Mason justly punished a wealthy debt collector that flouts the law. EMC invaded the Starks' home and continued to contact them directly—even after Judge Mason issued his award. As Judge Mason realized, a sizeable punitive-damages award is the only way to stop this debt collector's continuing reprehensible conduct.

The Starks are an elderly couple who live in a small Missouri town. When they could no longer pay their mortgage, they sought counsel and filed bankruptcy.[1] After the bankruptcy court lifted the automatic stay, on advice of counsel, they moved across the street to a rented duplex to avoid being evicted.[2] They were concerned about their reputation in the community and they wanted to abide by the law.[3]

EMC is a debt collector.[4] It purchased the Starks' defaulted loan so it could foreclose and take their home.[5] EMC's agents contacted the Starks at least 10 times after it knew they were represented by counsel. EMC contacted the Starks by letter, phone calls at work, and in person.[6]

When EMC began taking steps to foreclose, the Starks filed this lawsuit.[7] The Starks sued for EMC's violations of the Fair

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[1] Appellee Appendix, at 100.

[2] Appellee Appendix, at 148.

[3] Appellee Appendix, at 134.

[4] Appendix, at 24.

[5] Appendix, at 80.

[6] Appendix, at 1-38, Appellee Appendix, at 109, 362-63.

[7] Appendix, at 1.

Debt Collection Practices Act (FDCPA) and to enforce their rescission under the Truth in Lending Act.[8] The Starks also sued for emotional distress.[9]

Judge Smith, of the district court, denied the Starks' motion for a temporary restraining order preventing the pending foreclosure.[10] The main reason for the denial was that the Starks had already moved out.[11] Therefore, the TRO was not necessary to protect the *status quo*.[12] But EMC never foreclosed.[13]

EMC compelled the Starks into binding arbitration.[14] Judge Smith rejected the Starks' argument that the arbitration agreement was an unconscionable adhesion contract that abrogated their statutory rights.[15] Once in arbitration, EMC's agent broke into the Starks' home.[16] The agent posted a humiliating sign in the window stating EMC had taken possession.[17] With Judge Mason's consent, the Starks raised intentional-tort claims for EMC's forcible entry into their

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[8] Appendix, at 1.

[9] *See* Appendix, at 45, Amended Complaint, ¶ 52.

[10] Appendix, at 218.

[11] *Id.*

[12] *Id.*

[13] Appellee Appendix, at 28.

[14] Appendix, at 88.

[15] Appendix, at 161.

[16] Appendix, at 230, 386, 394, 548; Appellee Appendix, at 51, 53-54, 118-120.

[17] Appellee Appendix, at 118-120.

home.[18] The Starks sought actual damages and $14.8 million in punitive damages on their intentional-tort claims.[19]

The parties briefed and orally argued whether punitive damages and attorney fees were available under the arbitration agreement.[20] The Starks argued that the arbitration agreement was unconscionable.[21] But Judge Mason held the agreement was ambiguous because it promises powers to the arbitrator and then takes them away.[22] He held that the Starks could recover attorney fees on their FDCPA claims despite the arbitration agreement's prohibition of fee shifting.[23] He also held that he had the power to award punitive damages on the Starks intentional-tort claims against EMC.[24] He overruled EMC's motion to dismiss the Starks' punitive-damages claims.[25]

Months later, after taking evidence from EMC and considering more briefs, Judge Mason entered his final award.[26] He held that EMC repeatedly violated the FDCPA.[27] He also

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[18] Appendix, at 176, 564.

[19] Appellee Appendix, at 33.

[20] Appendix, at 175-76, 218.

[21] Appendix, at 362.

[22] Pet. App. 39a.

[23] Pet. App. 29a.

[24] Pet. App. 22a.

[25] Pet. App. 33a.

[26] Pet. App. 24a.

[27] Pet. App. 27a

found that even though the Starks had moved across the street on their counsel's advice, they had not abandoned their home.[28] He stated that EMC's forcible entry was "reprehensible and outrageous and in total disregard of [the Starks'] legal rights."[29]

Judge Mason awarded the Starks statutory damages, actual damages, punitive damages, and attorney fees.[30] For the punitive-damages award, Judge Mason noted the financial records provided by EMC showed shareholders equity of nearly $6 billion.[31] Judge Mason awarded the Starks punitive damages equal to one percent of shareholders equity.[32] He stated "[t]his is not great punishment but it should act as a deterence [sic]."[33] Judge Mason stated the amount of punitive damages was $6 million.[34]

The Starks later requested Judge Smith to remand the case to Judge Mason to clarify whether he intended to award one percent of shareholders equity, approximately $60 million, or the $6 million that he stated in the award.[35] Judge Smith agreed that, if he had not vacated the award, the issue would require further input from Judge Mason.[36] However, after Judge Smith

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[28] Pet. App. 28a.

[29] Pet. App. 28a

[30] Pet. App. 29a.

[31] Pet. App. 29a.

[32] Pet. App. 29a.

[33] Pet. App. 29a.

[34] Pet. App. 29a.

[35] Appendix, at 207.

[36] *See* Pet. App. 17a n.2.

vacated the award, Judge Mason sent Judge Smith a letter confirming that he intended to award $6 million.[37]

The Starks also refer the Court to the facts in Section I of the Eighth Circuit's decision.[38] None of the distinguished Eighth Circuit panel members (Heaney, Bye, Smith, JJ.) dissented. Judge Mason found EMC's breaking into the Starks' home during arbitration outrageous and reprehensible.[39] Judge Smith stated the punitive-damages award was "completely justified."[40] If Judge Smith had not erroneously construed the arbitration agreement's limited punitive-damages waiver, even he would have let the punitive-damages award stand.[41] But Judge Mason's award was not enough—on January 10, 2003, EMC violated the FDCPA by contacting the Starks again.

Figure 1 provides a timeline of the break-in and the direct contacts even after Judge Mason's award.[42]

On December 3, 2004, EMC finally paid the punitive-damages award.

The Starks list where EMC misstated facts and point out the petition's pertinent typographical errors:

1. Several times EMC states this case involves punitive damages awarded under the FDCPA.[43] This obfuscates

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[37] Pet. App. 32a.

[38] Pet. App. 2a-4a.

[39] Pet. App. 28a.

[40] Pet. App. 19a n. 3.

[41] Pet. App. 19a-20a n. 3.

[42] Resp. App. 13a.

[43] 15 U.S.C. § 1692-1692o; Pet. 2; Pet. 19.

the issue. EMC broke into the Starks' home after it forced the FDCPA case to arbitration. The Starks moved to add claims under Missouri's common law for intentional infliction of emotion distress and for invasion of privacy.[44] In district court later, EMC stated "[The Starks] were also permitted by the arbitrator to assert brand new common law claims of intentional infliction of emotional distress and invasion of privacy, over EMC's objection."[45] Missouri common-law-tort claims supported punitive damages, not FDCPA claims.

Demonstrating a fundamental misunderstanding of this case's issues, EMC argues punitive damages are not available under the FDCPA.[46] Judge Mason awarded punitive damages in this case for the Starks' common-law-intentional-tort claims. As the Eighth Circuit correctly observed, "the Starks moved to amend their complaint to include claims alleging intentional torts against EMC and seeking punitive damages."[47]

2. EMC states the Starks agreed their lender could "do . . . whatever is necessary to protect the value of the Property and Lender's rights in the Property," including "entering on the Property."[48] EMC misstates the agreement. The security agreement actually says, "Lender's actions may include . . . entering on the Property to make repairs."[49]

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[44] Appellee's Appendix 253.

[45] *Id.*

[46] Pet. 19.

[47] Pet. App. 3a.

[48] Pet. 3.

[49] Pet. App. 53a.

EMC misstates the facts saying, it "carried out its contractual obligation to investors in loans securitized by properties such as the Starks' to secure the premises by retaining a company to ensure that [the Stark]s' vacant home was protected from the elements and from vandalism."[50] Judge Mason ruled regarding EMC's testimony on this point. He stated in the award, "EMC offered the testimony of an employee as to the perils involved with vacant property. This was generalized testimony and none of those perils were attributed to the Stark property. Her testimony was not pertinent and deserves no further consideration."[51] EMC asks this Court to review the evidence and supplant its factual findings for Judge Mason's findings. But the Court has held "[w]e do not grant a certiorari to review evidence and discuss specific facts."[52]

3. EMC also claims it acted "pursuant to the terms of the Deed of Trust" when it broke into the Starks' home.[53] But EMC does not point out that it violated its own deed of trust by not giving the Starks notice prior to entering their home.[54] EMC and the Starks agreed that Judge Mason would construe the loan agreements, which include the deed of trust. The arbitration agreement states all claims must be arbitrated. It defines claim as, "anything . . . relating to . . . construction of the Loan Agreements."[55] Judge Mason

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[50] Pet. 3.

[51] Pet. App. 26a.

[52] *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.).

[53] Pet. 3.

[54] Pet. App. 54a, para. 9 (*see* correction of typographical error).

[55] Pet. App. 38a.

found that EMC's acknowledged agent forcibly entered the Starks home "without notice or consent . . . ."[56] Judge Mason also considered EMC's suggestion that its agent forcibly entered the home "for protection purposes."[57] He said, "[e]ven in a small town you don't protect a house by posting a sign. In fact this could advertise that the house is vacant and lead to vandalism or other perils."[58]

4. EMC claims it "allegedly violated" the FDCPA by contacting the Starks.[59] Yet, Judge Mason also made a factual finding on this issue. He found that "[t]he letters of 'acceleration' and 'foreclosure' required by law should have been sent to [the Starks' lawyer] True not to the plaintiff's [sic]."[60] He also found that the letters were deceptive.[61] More importantly, EMC did not appeal Judge Smith's confirmation of the FDCPA portions of the arbitration award. In fact, EMC did not even move Judge Smith to vacate the FDCPA portion of the award.[62] Therefore, the FDCPA issues are not before the Court.[63]

5. EMC mentions out of context that the Starks initially requested $165,285 in punitive damages.[64] The

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[56] Pet. App. 26a.

[57] Pet. App. 26a.

[58] Pet. App. 26a.

[59] Pet. 3.

[60] Pet. App. 27a.

[61] Pet. App. 27a.

[62] Pet. App. 4a.

[63] *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

[64] Pet. 3.

arbitration transcript shows the Starks derived that figure before EMC provided financial statements showing its nearly $6 billion net worth. Here is what Mr. True said to Judge Mason:

> [W]e've stated a figure on punitive damages for the tort claims of invasion of privacy and infliction of emotional distress. But keep in mind, Judge, we can't really give an accurate statement of what punitive damages would be appropriate here because we have never received financial information that we've requested and that you've ordered them to turn over.[65]

Judge Mason responded, "[a]nd I would give you time to get ready to present [evidence on the appropriate amount of punitive damages]."[66]

6. EMC claims that Judge Mason based his award on Bear Stearns' financial statements. Yet, EMC does not mention that Judge Mason relied on EMC's statement that it has no separate financial records. The transcript reflects the parties' discussion with Judge Mason on the issue:

> JUDGE MASON: According to the letter I have from John [Dods, attorney for EMC], EMC doesn't have separate financial records. They are a part of—I have forgotten the name of the organization.
>
> MR. TRUE: Bear Stearns.
>
> MR. DODS: Bear Stearns; yes, sir.
>
> JUDGE MASON: The broker?

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[65] Appellee's App. Vol. I, at 35.

[66] Appellee's App. Vol. I, at 36.

MR. DODS: Yes.

JUDGE MASON: Or the banker, whatever.

MR. DODS: And we have provided all of the records referenced where you could get Bear Stearns' information. It is all consolidated.[67]

Judge Mason specifically found in his award that EMC stated it does not have financial records separate from Bear Stearns. Judge Mason wrote, "[p]retrial True requested financial data of EMC. He was furnished financial data of the parent corporation, Bear, Stearns, with the explanation that as a subsidiary EMC does not have separate financial records."[68] Judge Mason continued, "[e]ven in this era of publicized corporate malfeasance and misfeasance, I find it difficult to believe that the CEO and Board of Directors of a large publicly traded corporation [Bear, Stearns] would not have financial information on a wholly owned subsidiary. I will accept the information provided."[69] Even though he doubted EMC was telling the truth, he had to accept the information EMC gave him.

If EMC does have separate financial records, then it must have deliberately deceived Judge Mason. Judge Mason based his award on the only financial information EMC did produce—Bear Stearns' financial statements. He relied on EMC's statement that it does not have separate financial records. EMC cannot defy Judge Mason by refusing to provide its financial records, and then argue Judge Mason acted improperly in relying on its deceptive statements.

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[67] Appellee's App. Vol. II, at 234-235.

[68] Pet. App. 28a.

[69] Pet. App. 28a-29a.

7. EMC even misstates Judge Mason's award when it says "the arbitrator awarded Respondents '$1,000.00' in 'actual damages,' [and] '$1,000.00' in 'statutory damages,' . . . ."[70] Judge Mason actually awarded each of the Starks those amounts, for a total of $4,000 in actual and statutory damages.[71]

Pertinent Typographical Errors

Pet. App. Page Reference	Incorrect statement	Correct statement
4a	The arbitrator found EMC's forcible entry into the premises. "reprehensible and outrageous and in total disregard of plaintiff's [sic] legal rights" and awarded $6,000,000 in punitive damages against EMC.	The arbitrator found EMC's forcible entry into the premises "reprehensible and outrageous and in total disregard of plaintiff's [sic] legal rights" and awarded $6,000,000 in punitive damages against EMC.[72]
29a	At one percent of shareholders equity this is not great punishment but it should act as a deference.	At one percent of shareholders equity this is not great punishment but it should act as a *deterence* [sic].[73]

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[70] Pet. 4.

[71] Pet. App. 29a; *see also* Pet. App. 4a (*see* correction of typographical error).

[72] Appeal Addendum, at 14.

[73] *See* Pet. 13a.

54a, para. 9	Lender shall give Borrower notice as the time of or prior to an inspection specifying reasonable cause for the inspection.	Lender shall give Borrower notice *at* the time of or prior to an inspection specifying reasonable cause for the inspection.[74]

REASONS FOR DENYING THE PETITION

Because it lost, EMC wants the Court to take this case, reverse 50 years of precedent, and expand judicial review of arbitrators. Yet, even EMC acknowledges the strong federal policy in favor of arbitration embodied in the Federal Arbitration Act (FAA). The Eighth Circuit adhered to the strong federal policy by following settled legal principles. Justice Stevens has stated, this Court "seldom takes a case merely to reaffirm settled law. . . ."[75]

EMC and the Starks chose retired Missouri judge Donald Mason to construe the arbitration agreement. The Eighth Circuit affirmed Judge Mason on three separate bases. The circuit court held that the arbitration contract's limited waiver permits punitive damages for intentional torts. Since this Court does not take cases that have had three levels of review (arbitrator, district court, circuit court) just to construe a private contract for private parties, the Court should deny certiorari.

EMC's argues the Eighth Circuit has changed Missouri law and contradicts its own case, *Gannon v. Circuit City Stores, Inc.*[76] EMC made its *Gannon* argument in a motion for rehearing *en banc*. The Eighth Circuit denied *en banc* review because it

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[74] Appellee's App. 411 (emphasis added).

[75] *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissent).

[76] *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001).

has limited *Gannon* to arbitrability.[77] The circuit court sees no conflict between *Gannon* and this case. And this Court does not resolve intracircuit conflicts—especially those that don't exist.

This Court need not expand the Constitution, when the Eighth Circuit reviewed the arbitration award for due-process violations in its manifest-disregard-of-law analysis. EMC can't cite a single case that supports expanded judicial review of arbitrators. The only arbitration case EMC cites is *Sawtelle v. Waddell & Reed, Inc.*[78] But that case is still on appeal and subject to reversal.[79] Even so, *Sawtelle* followed the same reasoning as the Eighth Circuit—folding due-process review into the manifest-disregard-of-law analysis. *Sawtelle* simply reached a different conclusion than the Eighth Circuit. EMC's dissatisfaction with the result actually drives its latest appeal, not disagreement with the Eighth Circuit's method.

The Eighth Circuit's decision is correct and does not conflict with any decision of this Court or another circuit court. The decision applied settled legal principles to the case's facts. The confirmation of an arbitration award on common-law-intentional-tort claims does not raise any important federal-law issue. So the Court should deny the petition.

The Starks will first show that the Eighth Circuit's alternate bases for its decision are adequate. Then the Starks will show that the case is fact specific and there is no intracircuit conflict. Next, the Starks will demonstrate that EMC's results-based review abrogates the strong federal policy in favor of

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[77] Pet. 21a.

[78] *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264 (A.D. 1 Dept. 2003).

[79] Susanne Craig, *New Rule May Lead More Arbitrations Into the Courtroom*, WALL STREET JOURNAL (EASTERN EDITION), Feb 4, 2005 at C1; Telephone interview with Rose, secretary for Jeffrey L. Liddle, Mr. Sawtelle's lawyer (February 24, 2005).

arbitration and that the decision was correct. Finally, the Starks will give two procedural reasons to deny certiorari.

1. The Court should deny certiorari because two adequate alternate bases support the Eighth Circuit's decision.

Even if the Court disagrees with the Eighth Circuit's holding that the punitive-damages waiver is limited by its own terms—to the extent permitted by law—the Eighth Circuit's two alternate bases adequately support its decision. Therefore, the Court need not grant certiorari.

A. Judge Mason resolved the arbitration agreement's ambiguity.

First, the Eighth Circuit held that Judge Mason's finding the arbitration agreement ambiguous on the availability of punitive damages was rational.[80] At one point, the arbitration agreement states the arbitrator must resolve claims under the FAA, which permits punitive-damages waivers. Yet, the choice-of-law provision states the arbitrator must resolve claims under "applicable [Missouri] law."[81] Missouri law does not permit punitive-damages waivers for future intentional torts.[82] Therefore, the Eighth Circuit held Judge Mason's finding ambiguity, although incorrect, was rational.

This Court holds that the arbitrator, not the court, must construe the arbitration agreement.[83] To resolve the ambiguity, Judge Mason construed the arbitration agreement against its drafter and ruled the Starks may claim punitive damages.[84] In

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[80] Pet. 10a-11a.

[81] Arbitration Agreement, Pet. App. 39a.

[82] Pet. App. 8a.

[83] *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 406-407 (2003).

[84] Arbitrator's Declaration of Law and Limited Findings of Fact, Pet. App. 22a-23a.

its petition, EMC does not argue Judge Mason was irrational. Therefore, because the Eighth Circuit's alternate basis for its holding is adequate, the Court need not grant certiorari.

B. The Eighth Circuit held Judge Mason did not manifestly disregard *State Farm* or *BMW*.

The Eighth Circuit held that Judge Mason did not manifestly disregard the law by awarding punitive damages. More specifically, he did not disregard *State Farm* or *BMW*.[85] First, Judge Mason could not have disregarded *State Farm*, which this Court did not decide until after the award.[86] Further, to meet the manifest-disregard-of-law standard, the arbitrator must clearly identify the law, then disregard it.[87] As the Eighth Circuit pointed out, the record does not show Judge Mason identified *BMW*, then disregarded it.[88]

The Eighth Circuit further held that Judge Mason correctly followed governing Missouri law on punitive damages. He based his calculation on EMC's net worth, as provided by Missouri law. EMC called Judge Mason a rogue,[89] but, in fact, he is a distinguished retired Missouri judge.[90] He is obviously capable of applying Missouri law.

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[85] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

[86] Pet. 13a n. 3.

[87] *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461-62 (8th Cir. 2001).

[88] Pet 13a.

[89] EMC's Petition For Rehearing *En banc*, filed Sept. 23, 2004.

[90] Judge Mason served on the 16th Circuit Court of Missouri for over 18 years. He is a former President of the Kansas City Bar Association, received the President's Award from the Missouri Bar and an Achievement Award from the Kansas City Missouri Bar Association. He graduated from Missouri Western University and the University of Missouri - Kansas City School of Law. Judge Mason was a practicing attorney for 24 years before he ascended to the bench.

In its petition, EMC does not argue the alternate bases are wrong. Either basis provides sufficient foundation for the Eighth Circuit's ruling. Therefore, the Court should deny certiorari.

2. The Court should deny certiorari because it does not resolve intracircuit conflicts and, even if it did, *Gannon* does not conflict with this case.

A. The Court does not resolve conflicts between circuit court panels.

Even though the Supreme Court does not resolve intracircuit conflicts, EMC primarily argues this Court must resolve a supposed conflict between the Eighth Circuit's *Gannon v. Circuit City Stores, Inc.*[91] and this case. This Court holds that a conflict between decisions rendered by different panels of the same Court of Appeals is not a sufficient basis for granting a writ of certiorari.[92] Instead, the Court of Appeals settles intracircuit conflicts by sitting *en banc*. This Court has concluded, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties."[93]

B. The Eighth Circuit finds no conflict with *Gannon*.

Knowing circuit courts resolve conflicts with *en banc* rehearings, EMC moved the Eighth Circuit for a rehearing.[94] EMC claimed the same conflict with *Gannon*. But the Eighth Circuit denied EMC's motion for a rehearing *en banc* by a wide majority. Eight judges voted against EMC.[95]

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[91] *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001).

[92] *Davis v. United States*, 417 U.S. 333, 340 (1974).

[93] *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

[94] Pet. App. 21a.

[95] The eight active circuit judges that voted not to rehear the case *en banc* are James B. Loken, Chief Judge, Morris S. Arnold, Diana E. Murphy, Kermit E. Bye, William Jay Riley, Michael J. Melloy, Lavenski R. Smith, and Duane Benton.

The Eighth Circuit knows this case cannot contradict *Gannon* because *Gannon* was an arbitrability case. Judge Bowman, who wrote *Gannon*, said the only issue "was whether the district court erred by not severing the invalid provision . . . and ordering the parties to proceed to arbitration on the remaining valid provisions."[96] The Eight Circuit has cited *Gannon* three other times—all in arbitrability cases.[97]

C. EMC relies on *Gannon dictum* that does not even conflict with this case.

In *Gannon*, included in the appendix,[98] the parties argued about whether they must arbitrate their dispute. Circuit City's arbitration agreement limited punitive damages to $5,000. Both parties agreed Missouri law invalidated the provision. Gannon argued that the entire arbitration agreement was unenforceable because of the invalid provision. But the Eighth Circuit held that the arbitration agreement was enforceable because the court can sever the invalid provision.

EMC desperately grasps *Gannon dictum* stating "Missouri courts have not suggested that it is improper to include [punitive-damages-limitation] terms in their contracts."[99] But Circuit City did not appeal the district court's decision invalidating its punitive-damages-limitation provision. In fact, Circuit City agreed with the district court. Therefore, *Gannon* did not decide the provision's validity under Missouri law. *Gannon* only made this statement in relation to its analysis of

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[96] *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp, U.S.A.*, 334 F.3d 721, 727 (8th Cir. 2003) *cert. denied*, 540 U.S. 1149 (2004) (Bowman, J., limiting *Gannon* to arbitrability).

[97] *See Pro Tech Industries, Inc. v. URS Corp.*, 377 F.3d 868, 871 (8th Cir. 2004); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004); *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 824 (8th Cir. 2003).

[98] Resp. App. 1a.

[99] *Gannon*, 262 F.3d at 681.

whether the invalid punitive-damages limitation fell under Missouri's public policy exception to the severance rule. Thus, *Gannon*'s statement is *dictum*. And this "Court does not decide important questions of law by cursory *dicta* inserted in unrelated cases."[100]

The Eighth Circuit held that EMC and the Starks limited the punitive-damages waiver in this case to negligent torts.[101] It did not hold, as EMC claims, that Missouri law prohibits punitive-damages waivers *per se*. *Gannon*'s *dictum* does not distinguish punitive damages for intentional torts and for negligence. So no conflict exists for this Court to resolve, even if it wanted to.

D. Even if in conflict with local law, the Court does not review cases where a circuit court reaches a reasonable result.

Finally, EMC argues that the Eighth Circuit misapplied Missouri law on punitive-damages waivers. Yet this Court is "extremely reluctant to accept review of court of appeals decisions alleged to conflict with applicable local law on the grounds of misapplication of state statutes and rules of decision, such as those relating to negligence, contracts, and property."[102] If the lower court reached a reasonable result, this Court declines review.[103] The Eighth Circuit simply followed an *en banc* Missouri Supreme Court case holding that one may not exonerate oneself from liability for future intentional torts.[104] Since the result is reasonable, no review is necessary.

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[100] *Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968).

[101] Pet. App. 14a.

[102] ROBERT L. STERN, SUPREME COURT PRACTICE (8th ed.) at 242.

[103] ROBERT L. STERN, SUPREME COURT PRACTICE (8th ed.) at 242.

[104] *Alack v. Vic Tanny Int'l of Missouri, Inc.*, 923 S.W.2d 330 (Mo. Banc. 1996).

EMC protests about an intracircuit conflict, but its dissatisfaction with the result actually drives this latest appeal. With this petition, EMC attempts again to delay the case's just conclusion.

3. The Court should not use this case to set precedent because it is fact specific.

A. The facts are unusual.

EMC invaded the Starks' home during arbitration. Thankfully, other multibillion dollar debt collection corporations do not break into debtors' homes—especially during arbitration proceedings. Similar cases have never arisen. EMC can cite no case factually on point. Because the facts are unusual, even if the Court wanted to address the questions presented, this case makes a bad vehicle.

B. The case does not raise important federal-law issues.

The Court recently declined to decide if parties may contract in arbitration for more judicial review than the FAA provides.[105] Despite the acknowledged circuit split in *Schoch v. InfoUSA, Inc.*, the Court found the question presented unworthy of review. No circuit court has cited this case. Lenders still arbitrate. If the acknowledged circuit split identified in *Schoch* is not worthy of review, then this simple confirmation case is not worthy either.

EMC argues that this case is important because it thought it was immune from punitive damages, even for intentional torts. But importance relates to the public, not to the parties involved.[106] EMC's misunderstanding of its own loan documents does not make this case important to the public.

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[105] *Schoch v. Infousa, Inc.*, 341 F.3d 785 (8th Cir. 2003), *cert. denied*, 540 U.S. 1180 (2004).

[106] *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

This case is not even important to EMC. EMC howls about the award, but it has easily paid it. In fact, EMC argued in the district court that it should not have to post a bond because it is so wealthy it can easily pay the award.[107] EMC said it would pay the award from Bear Stearns $7.4 billion in stockholder's equity.[108] When the district court ordered EMC to post a bond or pay the award into the court registry, EMC immediately paid the entire award. According to the income statements EMC provided during arbitration, it makes enough profit to pay this award by noon—everyday.

C. The Court should not grant certiorari to review the facts and supplant Judge Mason's contract construction.

EMC asks the Court to grant certiorari to review this case's facts. EMC claims it legally broke into the Starks' home under its loan documents. Yet, two levels of federal courts concur with the facts determined by Judge Mason. This Court has often held that "[a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."[109] Further, the Court has held, "[w]e do not grant a certiorari to review evidence and discuss specific facts."[110]

Because EMC disagrees with the Eighth Circuit, it argues this Court should construe the arbitration contract differently.

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[107] EMC's Motion to Stay Execution, filed November 23, 2004.

[108] *Id.*

[109] *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) and cases cited; *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (declining to reconsider lower court's factual conclusions).

[110] *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.).

Yet, this Court usually denies certiorari when a lower court decision turns upon how it construed a particular contract.[111]

EMC also complains that its chosen arbitrator, Judge Mason, wrongly decided the punitive-damages issue. As the Eighth Circuit pointed out, "[a]fter extensive briefing, the arbitrator concluded the limitation was ambiguous and construed the language against EMC."[112] In *PacifiCare Health Systems, Inc. v. Book*, this Court unanimously held that the arbitrator—not the district court—must decide if punitive-damages limits in arbitration agreements are ambiguous.[113] Now that the Eighth Circuit has rejected its request, EMC asks this Court to supplant Judge Mason's construction with its contract construction. But parties may challenge an award only on three grounds:

- the statutory bases in the FAA;
- under the manifest-disregard-of-law analysis; and
- under the complete-irrationality test.

EMC does not even argue these points in its petition. The parties bargained for Judge Mason's contract construction. As Judge Easterbrook pointed out, "the question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract."[114] Judge Mason interpreted the contract.

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[111] Robert L. Stern, Supreme Court Practice, 8th Ed., at 249.

[112] Pet. App. 3a.

[113] *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 406-407 (2003).

[114] *George Watts & Son Inc. v. Tiffany and Co.*, 248 F.3d 577, 579 (7th Cir. 2001) (quoting *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987); citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)).

4. The Court must reject expanded judicial review of arbitrators because it would apply the Constitution to private contracts and cause more litigation.

Citing only jury cases, EMC argues the Court must expand the Constitution to cover private arbitration contracts. All circuit court arbitration cases addressing expanded judicial review have rejected it, either because arbitration is not state action or because parties waive their due-process rights when they voluntarily arbitrate disputes.[115] In this case, the arbitration agreement absolutely prohibits expanded judicial review. It says the arbitrator's award "shall be final" and is "nonappealable."[116] A party that voluntarily arbitrates its dispute does not bargain for our judicial system's benefits and protections.[117]

A. A private arbitrator imposing punitive damages is not state action.

The Court should reject EMC's suggestion that the Due Process Clause limits punitive damages in arbitration, because this would expand the Constitution to private contracts. The Eleventh Circuit holds that a private arbitrator imposing punitive damages is not state action.[118] This Court holds that FAA § 2 makes "arbitration agreements as enforceable as other contracts, but not more so."[119] Applying the Due Process Clause

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[115] *See Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940 (10th Cir. 2001); *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064 (9th Cir. 1991).

[116] Pet. App. 40a.

[117] *Schoch v. Infousa, Inc.*, 341 F.3d 785, 791 (8th Cir. 2003), *cert. denied*, 540 U.S. 1180 (2004).

[118] *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191-92 (11th Cir. 1995).

[119] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

to this private arbitration contract would elevate it above other private contracts. Therefore, the Court should reject EMC's argument that the Due Process Clause applies to private arbitration contracts.

B. EMC waived its due-process rights by forcing the Starks to arbitrate.

Even if the Court considers the confirmation of an arbitration award state action, EMC has waived its due-process rights by forcing the Starks into arbitration.[120] If the parties voluntarily agreed to arbitrate their disputes, then they have waived their due-process rights.[121] Only those who opt for the judicial system's protections retain their due-process rights.

EMC cannot rely on jury cases for its constitutional arguments. Those who go before a jury retain their due-process rights. In fact, the Eleventh Circuit distinguished jury trials from private arbitration concluding that "the federal policy favoring arbitration, as well as the absence of the bias and runaway punitive awards prevalent in the jury context, distinguish the arbitral award in the present case from the jury award of punitive damages in *Honda Motor Co.*"[122] Notably, EMC cites only jury cases like *BMW* to support its constitutional arguments. EMC wants the Court to extend *BMW* to arbitration. The Court vacated six lower court decisions after *BMW*, but none of them were arbitration cases.[123] There is no precedent for extending *BMW* to arbitration.

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[120] *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940 (10th Cir. 2001); *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995); (both cases following *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991) (focusing on the voluntary nature of arbitration and rejecting a due-process challenge to arbitral punitive-damages award)).

[121] *Id.*

[122] *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995).

[123] *See Sperau v. Ford Motor Co.*, 674 So.2d 24 (Ala. 1995), *vacated*, 517 U.S. 1217 (1996); *American Pioneer Life Ins. Co. v. Williamson*, 681 So.2d 1040 (Ala. 1995), *vacated*, 517 U.S. 1231 (1996); *Continental Trend Resources, Inc. v.*

(Cont'd)

C. Limiting judicial review, not expanding it, better serves the strong federal policy favoring arbitration.

EMC suggests the lack of due-process protection in arbitration will decrease the number of voluntary arbitrations,[124] but it provides no evidence that this case has affected the number of arbitrations. This Court has noted that parties agree to arbitrate because of the benefits historically received—expedition, simplicity, and reduced costs.[125] Even after this case, the chairman of the National Home Equity Mortgage Association, Mitchell Feinstein, said arbitration is "a simpler, cheaper, and quicker method for resolving legitimate disputes."[126] Feinstein lobbied Fannie Mae and Freddie Mac to stop their ban on mandatory-binding-arbitration clauses.[127] If parties believe choosing arbitration will embroil them in years of expanded judicial review, they will not arbitrate. Instead they will litigate. With expanded judicial review, arbitration will, at best, become merely one more phase of litigation.

In fact, the current trend in federal courts is to further limit judicial review of arbitrators, not expand it. Relying on

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OXY USA, Inc., 44 F.3d 1465 (10th Cir. 1995), *vacated*, 517 U.S. 1216 (1996); *Apache Corp. v. Moore*, 891 S.W.2d 671 (Tex. App. 1994), *vacated*, 517 U.S. 1217 (1996); *Union Sec. Life Ins. Co. v. Crocker*, 667 So.2d 688 (Ala. 1995), *vacated*, 517 U.S. 1230 (1996); *Life Ins. Co. of Georgia v. Johnson*, 684 So.2d 685 (Ala. 1996), *vacated*, 519 U.S. 923 (1996); *Johansen v. Combustion Eng'g, Inc.*, 834 F.Supp. 404 (S.D. Ga. 1993), *aff'd*, 67 F.3d 314 (11th Cir. 1995) (mem.), *vacated*, 517 U.S. 1217 (1996), *remanded*, 98 F.3d 1351 (11th Cir. 1996).

[124] Pet. 19.

[125] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

[126] Jody Shenn, *Just Clause? Arbitration In Subprime*, AMERICAN BANKER, Sept. 7, 2004, at 1.

[127] *Id.*

this Court's *Eastern Associated Coal Corp. v. United Mine Workers of America*,[128] Judge Easterbrook may have purged the Seventh Circuit of manifest-disregard-of-law analysis.[129] Under Judge Easterbrook's severely limited manifest-disregard-of-law analysis, if an arbitrator does not require the parties to violate the law, the award stands.[130] Commentators praise Judge Easterbrook for allowing "parties, arbitrators, and courts to realize the benefits of arbitration, while avoiding the drawbacks associated with the lack of finality in a decision."[131] But expanded judicial review denies the strong federal policy favoring arbitration this Court established 50 years ago. Expanded judicial review makes arbitration "yet another step on the ladder of litigation."[132]

D. The Court should not rely on *Sawtelle*, which is still on appeal.

To support its expanded judicial review argument, EMC cites *Sawtelle v. Waddell & Reed, Inc.*, the inferior New York state court.[133] The Supreme Court should not grant certiorari to review a federal circuit court decision merely because its result differs from an inferior state court's decision. Further, the *Sawtelle* case is still on appeal.[134] The Court should not rely

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[128] *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57 (2000).

[129] *George Watts & Son Inc. v. Tiffany and Co.*, 248 F.3d 577 (7th Cir. 2001).

[130] *Id.*

[131] Paul J. Krause, *Disregarding Manifest Disregard: Watts Shifts Standard for Vacating Arbitrators' Decisions*, DEFENSE COUNSEL JOURNAL, Jan. 2005, at 79.

[132] *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 n.7 (10th Cir. 2001).

[133] *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264 (A.D. 1 Dept. 2003).

[134] Susanne Craig, *New Rule May Lead More Arbitrations Into the Courtroom*, WALL STREET JOURNAL (EASTERN EDITION), Feb 4, 2005 at C1; Telephone interview with Rose, secretary for Jeffrey L. Liddle, Mr. Sawtelle's lawyer (February 24, 2005).

on an lower court opinion that the higher court may reverse. Finally, *Sawtelle* does not even conflict with this case. The Eighth Circuit folded the *BMW* due-process analysis into its manifest-disregard-of-law analysis. *Sawtelle* followed the same reasoning, but simply reached a different result.

5. The Court should deny certiorari because the decision is correct.

The Court's primary concern is not correcting lower court errors. Rule 10 states the Court will rarely grant review where lower court has arguably misapplied a properly stated rule of law. Still, the decision below is correct.

The timeline in figure 2 shows what EMC knew when it drafted the arbitration agreement.[135] Since 1996, EMC was aware of the *Alack* decision, holding that one cannot waive punitive-damages claims for intentional torts.[136] In 1999, the parties signed the arbitration agreement, which incorporated *Alack*'s holding into its limited punitive-damages waiver. Now, post-*Gannon*, EMC can comfortably draft an arbitration agreement that contains a full waiver of punitive damages, knowing that, at worst, a federal court may sever the waiver and still enforce the arbitration agreement.[137] But in 1999, EMC did not know about *Gannon* because the Eighth Circuit did not decide it until 2001. This explains why EMC, always represented by excellent counsel, drafted a limited punitive-damages waiver, not a full one.

Having drafted the limited-punitive-damages waiver with Missouri law in mind, EMC should have realized that its intentional tort of breaking into the Starks' home would expose it to punitive damages. Yet, EMC states, "No one who signed

[135] Resp. App. 14a.

[136] *Alack v. Vic Tanny Int'l of Missouri, Inc.*, 923 S.W.2d 330 (Mo. 1996) (*en banc*).

[137] *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001).

an arbitration agreement excluding punitive damages could have reasonably expected that its conduct could result in such punishment."[138] Not only did EMC sign the arbitration agreement – EMC wrote it. So, of all people, EMC should have known that it drafted a limited punitive-damages waiver. EMC knew an unlimited punitive-damages waiver would not be enforceable in Missouri under *Alack*. Further, it would run the risk that its entire arbitration agreement might be thrown out, as argued in *Gannon*.

The Eighth Circuit's decision is correct and restates settled law. The Eighth Circuit simply held that "an attempt to procure a waiver of punitive damages is an attempt to exonerate oneself from future liability for intentional torts or gross negligence, because the remedy of punitive damages would otherwise be available for such acts."[139] EMC's misunderstanding of its own loan documents is not a reason to reverse the Eighth Circuit. Therefore, the Court should deny certiorari.

6. The Court should deny certiorari because EMC has not preserved its questions presented for review.

A. EMC waived its due-process argument by not making it in the arbitration proceeding.

EMC has not preserved its due-process issue for review because it did not raise it before Judge Mason. This Court holds, once in arbitration, all issues are for the arbitrator to decide.[140] Therefore, Judge Mason decides if EMC received due process. EMC cannot raise issues for the first time on a motion to vacate the arbitration award in the district court.[141] During arbitration,

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[138] Pet. 16.

[139] Pet. App. 8a.

[140] *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 406-407 (2003) (punitive-damages waiver).

[141] *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1063 n.2 (8th Cir. 2003).

the Starks requested Judge Mason award $14.8 million in punitive damages.[142] EMC's lawyer knew about the punitive-damages request in arbitration. He stated, "this is the first time I have heard it was $14.8 million."[143] Even though EMC filed a closing arbitration brief, it did not raise the due-process argument before Judge Mason.[144] Instead, EMC waited until its motion to vacate the arbitration award.[145] Because EMC did not preserve its due-process argument for review, the Court should deny certiorari.

B. EMC did not press its questions presented before the Eighth Circuit either.

(1) EMC did not raise the supposed Gannon conflict.

EMC has not preserved its first question presented, which argues the Eighth Circuit interpreted Missouri law in a way conflicting with its own case, *Gannon v. Circuit City Stores, Inc.*[146] A question presented in the petition but not raised in the court of appeals is not properly before the Supreme Court.[147] In the Eighth Circuit, the Starks' argued that Missouri's *Alack v. Vic Tanny Int'l of Missouri, Inc.*[148] prevents EMC from exonerating itself from future liability for intentional torts. EMC responded to the Starks' argument,[149] but did not raise the supposed *Gannon* conflict in its appellate brief.[150] Because EMC did not

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[142] Appellee's Appendix, Vol. 2, at 394.

[143] *Id.*

[144] *See generally*, Respondent's Post-Hearing Brief in Arbitration (Nov. 15, 2002).

[145] Appellee's Appendix, Vol. 2, at 269.

[146] *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001).

[147] *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

[148] *Alack v. Vic Tanny Int'l of Missouri, Inc.*, 923 S.W.2d 330 (Mo. 1996) (*en banc*).

[149] Appellee's Brief at 41 (responding to *Alack* argument).

[150] Appellee's Brief at 6-10 (Table of Authorities does not list *Gannon*).

raise the *Gannon* conflict before the Eighth Circuit panel, it did not preserve the question presented for review by this Court.[151]

EMC will argue it raised *Gannon* in its motion for rehearing before the Eighth Circuit. But EMC does not petition the Court to review the Eighth Circuit's rehearing denial. So the Court should deny the petition for certiorari.

(2) EMC did not ask the Eighth Circuit to expand judicial review beyond the manifest-disregard-of-law analysis.

Similarly, the Eighth Circuit did not decide EMC's second question presented, seeking expanded judicial review of arbitrators. If a party does not argue a question below, the Court need not address it.[152] EMC argued below that the punitive-damages award was excessive and, therefore, Judge Mason had manifestly disregarded the law.[153] EMC did not ask the Eighth Circuit to expand judicial review beyond the manifest-disregard-of-law analysis.

The Eighth Circuit did as EMC asked—folded due-process review into the manifest-disregard-of-law analysis.[154] Under that analysis, the Eighth Circuit held Judge Mason followed the law.[155] Now, having lost under that analysis, EMC argues that this Court must expand judicial review even more. But EMC did not preserve that issue for review, and, therefore, the Court should deny certiorari.[156]

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[151] *See Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

[152] *Yee v. City of Escondido, California*, 503 U.S. 519, 533 (1992) (substantive-due-process claim).

[153] Appellee's Brief, at 52.

[154] Pet. App. 11a.

[155] Pet. App. 11a-14a.

[156] *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

CONCLUSION

EMC forced the Starks to arbitrate. The Starks insisted that the arbitration agreement was unilateral, unfair and unconscionable.[157] Having demanded arbitration, the Court must presume EMC knew arbitration procedures differ from judicial procedures. Now, having lost in arbitration, EMC makes one last effort to change the result. In doing so, EMC has turned this arbitration into just "one more step on the ladder of litigation."[158] EMC will continue this litigation until it gets a result it likes.

To answer the questions presented, no, the Court should not review the supposed intracircuit conflict. First because the Court does not review intracircuit conflicts; second because there is no conflict. No, the Court should not expand the Constitution to private contracts. As stated in *Watts*, the arbitrator is the parties' mutual agent, chosen by them to resolve their disputes.[159] He is a private person acting under a private contract. There is no state action and no constitutional protection.

EMC cares only about the result, law or no law. Having lost in arbitration, EMC wants out. There is no other way to explain the spectacle of a multibillion dollar debt collection corporation, with 52,000 arbitration agreements just like this one,[160] arguing that the Court should expand judicial review of arbitrators. EMC's petition is a result in search of a rationale. It is an assault on arbitration.

The Court should deny the petition for writ of certiorari.

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[157] Appellant's App. at 108.

[158] *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 n.7 (10th Cir. 2001).

[159] *George Watts & Son Inc. v. Tiffany and Co.*, 248 F.3d 577, 580-81 (7th Cir. 2001).

[160] Pet. App. 25a.

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APPENDIX

APPENDIX – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED AUGUST 17, 2001

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 00-3243

MARKEN GANNON,

Plaintiff - Appellee,

v.

CIRCUIT CITY STORES, INC.,

Defendant - Appellant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMICUS ON BEHALF OF APPELLEE.

Submitted: April 13, 2001

Before Bowman and Fagg, Circuit Judges, and VIETOR,[1] District Judge.

The opinion of the court was delivered by: Bowman, Circuit Judge

Appeal from the United States District Court for the Eastern District of Missouri.

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1. The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa, sitting by designation.

Appendix

This appeal presents the issue of whether a written agreement between an employee and employer to settle all employment-related disputes exclusively through binding arbitration remains enforceable after a provision within the agreement is found invalid. The District Court concluded that the inclusion of the invalid provision rendered the entire arbitration agreement unenforceable. We reverse.

I.

In May 1998, Marken Gannon applied for employment with Circuit City Stores, Inc., in Ellisville, Missouri. As a prerequisite to her employment, Circuit City presented Gannon with its Dispute Resolution Agreement for her to sign. The agreement provided that Gannon agreed to settle all employment-related claims against Circuit City exclusively through binding arbitration. The agreement advised her to familiarize herself with the rules and procedures under the agreement prior to signing. Terms in bold type informed Gannon that the agreement affected her legal rights and that she might want to seek legal advice before signing. It also stated that she could withdraw her consent up to three days after signing the agreement and specified how she could effectuate a withdrawal. Gannon signed the agreement and Circuit City hired her.

After approximately one year of employment, Circuit City terminated Gannon. Following her discharge, Gannon filed charges with the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights alleging that during her employment with Circuit City she had encountered sexual harassment, a hostile work environment, sex discrimination, and retaliation. Upon receiving her right-to-sue letters from both agencies, she brought suit in federal court. Circuit City responded by filing a motion to dismiss the case and to compel

arbitration based on the arbitration agreement Gannon had signed. The District Court declined to compel arbitration. It determined that the entire agreement was unenforceable because it contained an invalid clause that limited punitive damages.[2] Circuit City filed a motion for reconsideration, arguing that it no longer enforced the punitive damages clause and that another provision in the agreement served to automatically strike terms judicially determined to be unenforceable. The District Court denied the motion and Circuit City appeals.[3] On appeal, Circuit City does not challenge the ruling that the punitive-damages clause is unenforceable, but argues that the clause should be severed and Gannon should be compelled to arbitrate her claims under the remaining terms of the agreement.

II.

Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (1994), "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). The FAA declares that written agreements to resolve disputes through arbitration are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994). The effect of the FAA was to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). In

2. The clause found invalid by the District Court limited punitive damages to five thousand dollars.

3. The Federal Arbitration Act explicitly provides us with jurisdiction to hear such interlocutory appeals. 9 U.S.C. § 16 (1994).

Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001), the Supreme Court held that the FAA's provisions apply to arbitration agreements covering employment-related claims. Id. at 1311 (holding that in the employment context "only contracts of employment of transportation workers" are exempted from the FAA's coverage). The FAA therefore governs Gannon's arbitration agreement with Circuit City and we undertake our review keeping in mind that the FAA evinces a "liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp., 460 U.S. at 24.

Our role in determining whether a court should compel arbitration is limited. We must determine simply whether the parties have entered a valid agreement to arbitrate and, if so, whether the existing dispute falls under the coverage of the agreement. Larry's United Super, Inc., v. Werries, 253 F.3d 1083, 1085 (8th Cir. 2001); Keymer v. Mgmt. Recruiters Int'l, Inc., 169 F.3d 501, 504 (8th Cir. 1999). Once we conclude that the parties have reached such an agreement, the FAA compels judicial enforcement of the arbitration agreement.

We review the District Court's interpretation of the arbitration agreement de novo, Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943, 945 (8th Cir. 2001), and we look to Missouri contract law to interpret the validity of the agreement. Id. at 946.

III.

The parties agree that they entered into an agreement to settle disputes through binding arbitration and that their agreement covers the present dispute. They contest, however, the validity of the agreement following the District Court's conclusion that one provision within the agreement was invalid. Circuit City contends that, under the terms of the arbitration agreement and Missouri

contract law, the invalid clause should be struck and Gannon should be compelled to arbitrate her claims in accordance with the remaining terms of the agreement. Gannon argues that the invalid provision renders the entire agreement unenforceable as a matter of public policy.

A.

"The primary rule in the interpretation of a contract [under Missouri law] is to ascertain the intention of the parties and to give effect to that intention." Speedie Food Mart, Inc. v. Taylor, 809 S.W.2d 126, 129 (Mo. Ct. App. 1991). When the contract is unambiguous, the intent of the parties should be determined from the instrument alone. Marshall v. Pyramid Dev. Corp., 855 S.W. 2d 403, 406 (Mo. Ct. App. 1993).

Rule 18 of the Circuit City arbitration agreement specifically states the intent of the parties in the event a provision within the agreement is found invalid. It provides that, "[i]n the event that any of these Dispute Resolution Rules and Procedures agreed upon by the Parties is held to be in conflict with a mandatory provision of applicable law, the conflicting Rule or Procedure shall be modified automatically to comply." It also states that "[i]n the event of an automatic modification with respect to a particular Rule or Procedure, the remainder of these Rules and Procedures shall not be affected." The terms of Rule 18 express an unambiguous intent by the parties to sever any terms determined to be invalid and to allow all claims to proceed to arbitration under the remaining provisions of the agreement.

Even if the parties had not recorded their intentions in the severability provision, Missouri contract law declares severance to be proper in this instance. "With respect to contracts which contain a forbidden or invalid

provision, our Supreme Court at an early date declared 'the general rule to be, that if the good be mixed with the bad, it shall nevertheless stand, provided a separation can be made.'" Kisling v. MFA Mut. Ins. Co., 399 S.W.2d 245, 250 (Mo. Ct. App. 1966) (quoting Koontz v. Hannibal Sav. & Ins. Co., 42 Mo. 126, 129 (1868)). The essence of the contract between Circuit City and Gannon is an agreement to settle their employment disputes through binding arbitration. The punitive-damages clause represents only one aspect of their agreement and can be severed without disturbing the primary intent of the parties to arbitrate their disputes. "[W]here one provision in a contract, which does not constitute its main or essential feature or purpose, is void . . . but is clearly separable and severable from the other parts which are relied upon, such other parts are not affected by the invalid provision, and may be enforced as if no such provision had been incorporated in the contract." Shibi v. Miller, 268 S.W. 434, 436 (Mo. Ct. App. 1925).

B.

Gannon argues that public-policy concerns override these contractual rules and require that we hold the entire arbitration agreement unenforceable.[4] Although Missouri common law ordinarily allows the severance of invalid terms, Gannon relies on a narrow exception that prohibits severance "where there is some 'all-pervading vice, such as fraud, or some unlawful act which is condemned by public policy or the common law and avoids all parts of the transaction because all are alike infected.'" Id. (quoting Koontz, 42 Mo. at 129).

She asserts that allowing severance of an invalid provision within an arbitration agreement falls within this

4. The Equal Employment Opportunity Commission, as amicus curiae, joins Gannon in this argument.

exception. According to Gannon, employers will be emboldened to include improper terms because employees will be forced either to arbitrate under the unfair terms or to go to court to get them removed from the agreement. Gannon claims that because severance provides employers with such an improper incentive, we must therefore hold the entire agreement unenforceable to discourage such behavior.

We disagree. The inclusion of the damages-limitation clause does not infect the agreement with any type of defect that requires us to invalidate the entire contract. We recognize that in certain situations one party may include so many invalid provisions that the validity of the entire agreement would be undermined. For example, in Hooters of America, Inc. v. Phillips, an entire arbitration agreement was found unenforceable because Hooters promulgated "so many biased rules" that it created "a sham system unworthy even of the name of arbitration." 173 F.3d 933, 940 (4th Cir. 1999). Circuit City's agreement does not, however, present such a case. Although Circuit City has not appealed the decision of the District Court that invalidated the punitive-damages provision,[5] this Court had no controlling precedent at the time the contract was executed, nor does it today, which states that such a limitation is necessarily invalid.[6]

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5. Circuit City has provided affidavit testimony that it has amended the rules and procedures of its arbitration agreements with its employees to exclude the provision limiting damages on front pay, back pay, and punitive damages and now authorizes arbitrators to award whatever relief would be available in court under the law. It therefore has no desire to appeal regarding the provision's validity.

6. In fact, we recently held in Larry's United Super, Inc., v. Werries, that the question of whether a waiver of RICO punitive damages in an arbitration agreement was valid remained a matter for arbitrators, not the courts, to decide in the first instance. See 253 F.3d 1083, 1086 (8th Cir. 2001).

Likewise, Missouri courts have not suggested that it is improper for parties to include such terms in their contracts. In these circumstances, the inclusion of the damages clause does not meet the public-policy exception prohibiting severance under Missouri contract law. See Kisling, 399 S.W.2d at 251 (rejecting public-policy argument where party failed to provide supporting legal authority); White v. McCoy Land Co., 87 S.W.2d 672, 685 (Mo. Ct. App. 1935) (embracing the proposition that only the state constitution, laws, or judicial decisions represent proper evidence of public policy).

With regard to Gannon's more general public-policy arguments, we note that the FAA limits our review of an arbitration agreement to determining whether a dispute is properly arbitrable, and our authority does not extend to the consideration of public- policy advantages or disadvantages resulting from the enforcement of the agreement. See Werries, 253 F.3d at 1086.

This is particularly true where controlling federal public policy has already been firmly established. The Supreme Court has recognized that "'[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that we rigorously enforce agreements to arbitrate.'" Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625-26 (1985) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

The boundaries of private arbitration agreements in the employment context are currently being set, with the Supreme Court only recently affirming that the FAA extends to arbitration agreements covering employment disputes. See Circuit City Stores, Inc., 121 S. Ct. at 1311. In an evolving climate such as this, if we were to hold

entire arbitration agreements unenforceable every time a particular term is held invalid, it would discourage parties from forming contracts under the FAA and severely chill parties from structuring their contracts in the most efficient manner for fear that minor terms eventually could be used to undermine the validity of the entire contract. Such an outcome would represent the antithesis of the "liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp., 460 U.S. at 24; see also Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."). Accordingly, we reject Gannon's public-policy arguments. [7]

By signing the arbitration contract, Gannon demonstrated her intent to resolve any employment disputes with Circuit City through binding arbitration. See Mitsubishi Motors Corp., 473 U.S. at 626 ("Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."). We do not believe that the severance of the provision limiting punitive damages diminishes her contractual intent to arbitrate because excluding the provision only allows her the opportunity to arbitrate her

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7. We also disagree with Gannon's assertion that severance encourages employers to include improper terms in arbitration agreements. The parties' dispute over the enforceability of the arbitration agreement has caused many months of time-consuming and expensive litigation for both sides. The Supreme Court has long recognized that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" Gilmer, 500 U.S. at 31 (quoting Mitsubishi, 473 U.S. at 628). Circuit City has now lost many of the advantages of arbitration because of the present dispute. We believe that these forfeitures belie the argument that severance encourages employers to insert problematic terms that likely will result in litigation.

claims under more favorable terms than those to which she agreed.[8]

IV.

Severing the punitive-damages clause is consistent with the terms of the contract, the intent of the parties, Missouri contract law, and the FAA's policy favoring the enforcement of arbitration agreements. We therefore reverse the judgment of the District Court and remand the case for further proceedings consistent with this opinion.[9]

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8. We recognize that the Eleventh Circuit has found public-policy arguments similar to those advanced by Gannon persuasive in holding that an arbitration agreement in the employment context is unenforceable because it included an invalid provision. See Perez v. Globe Airport Sec. Serv., Inc, 253 F.3d 1280, 1286-87 (11th Cir. 2001). To the extent that the court relied on these public-policy arguments for its holding we would disagree with the decision in Perez. We note that the arbitration agreement in Perez did not have a severability clause and that the case is distinguishable from the present case on that ground. See Perez, 253 F.3d at 1286 ("The Globe arbitration agreement does not contain a severability provision, and this court has previously rejected the contention that the policy favoring arbitration agreements requires that courts sever unlawful provisions, rather than void the agreement.").

9. Because the District Court concluded that the punitive-damages limitation was a sufficient ground for invalidating the entire arbitration agreement, it did not consider Gannon's argument that fee-sharing provisions in the agreement were also invalid. On remand, Gannon may renew her arguments concerning the fee-sharing provisions. If she does so, the District Court should consider her arguments in light of the Supreme Court's recent decision in Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 92 (2000) (holding that "a party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs."). Under the terms of the arbitration agreement, which carefully limit the amount of fees that Gannon can incur, we think it doubtful that Gannon can succeed in an attack on the fee-sharing provisions. Moreover, were those provisions held invalid, in all likelihood they would be severable. But those questions are not before us, and we do not decide them in the present appeal.

Appendix

VIETOR, Senior District Judge, dissenting.

I respectfully dissent.

I believe public policy was violated by Circuit City when it placed in the arbitration agreement the extreme limitation on punitive damages.[10] The limit takes away all but $5,000 of the $300,000 maximum recovery available under Title VII. The Missouri Human Rights Act contains no limit on punitive damages. Circuit City's counsel conceded at oral argument that job applicants are not told that the punitive damages limitation is far less than the amount recoverable under the law.

The near-eradication of substantive recovery rights enacted by Congress and the Missouri legislature is, in my judgment, unconscionable. I think the Eleventh Circuit got it right in Perez v. Globe Airport Security Services, Inc., 253 F.3d 1280 (11th Cir. 2001), a decision with which the majority, in footnote 8, disagrees. The Perez court stated: "An arbitration agreement containing provisions that defeat a federal statute's remedial purpose is . . . not enforceable." Id. at 1287. An attempt by the employer to defeat the remedial purpose of Title VII taints the entire agreement, making it unenforceable. Id. For reasons expressed by the appellee in this case and by the Eleventh Circuit in Perez at 1287, severance of the offending provision and enforcement of the remainder of the agreement is not an appropriate resolution.

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10. The agreement to arbitrate was crafted by Circuit City, not by the parties. Ms. Gannon played no part in drafting the agreement. It was presented to her on a take-it- or-leave-it basis as a condition of gaining employment with Circuit City. She either signed or she did not get the job. Circuit City's job application form provided to Ms. Gannon clearly states: "Circuit City will not consider your application unless [the Dispute Resolution Agreement] is signed."

The majority expresses concern that "if we were to hold entire arbitration agreements unenforceable every time a particular term is held invalid, it would discourage parties from forming contracts under the FAA and severely chill parties from structuring their contracts in the most efficient manner for fear that minor terms eventually could be used to undermine the validity of the entire contract." I do not think so. An affirmance in this case would not send a message that entire arbitration agreements would be unenforceable "every time a particular term is held invalid" and would not engender a fear that "minor terms eventually could be used to undermine the validity of the entire contract." This case does not involve a procedural provision or a minor term of any sort. It involves a term that guts a major substantive remedy that Congress and the Missouri legislature chose to provide to employees. It is a term that seeks to drastically change the substantive law (in favor of the employer) that is to be applied in the arbitration process. That definitely is not minor.

I would affirm.

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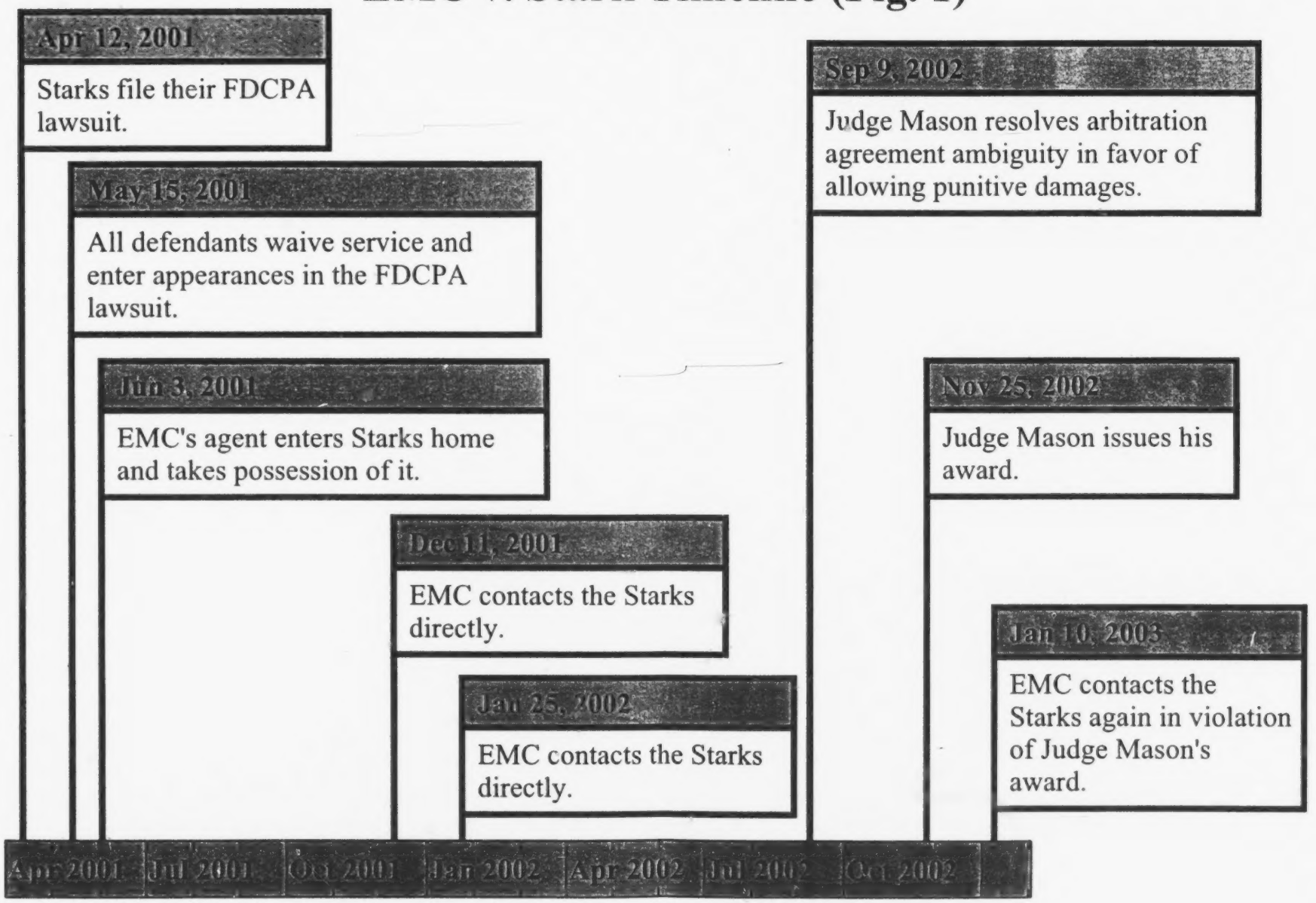
Appendix

EMC v. Stark Timeline (Fig. 1)


Apr 12, 2001
Starks file their FDCPA lawsuit.
May 15, 2001
All defendants waive service and enter appearances in the FDCPA lawsuit.
Jun 3, 2001
EMC's agent enters Starks home and takes possession of it.
Dec 11, 2001
EMC contacts the Starks directly.
Jan 25, 2002
EMC contacts the Starks directly.
Sep 9, 2002
Judge Mason resolves arbitration agreement ambiguity in favor of allowing punitive damages.
Nov 25, 2002
Judge Mason issues his award.
Jan 10, 2003
EMC contacts the Starks again in violation of Judge Mason's award.
Apr 2001
Jul 2001
Oct 2001
Jan 2002
Apr 2002
Jul 2002
Oct 2002

14a

Appendix

Cases Timeline (Fig. 2)